IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1935, No. 878
OCTOBER TERM, 1936

No. 20

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

184 Wash. 648, 52 Pac. (2d) 1274

ADDITIONAL BRIEF OF APPELLEE

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ADDITIONAL BRIEF OF APPELLEE

This additional brief is submitted in compliance with the request of the court to "file additional and clarifying briefs preparatory to oral argument on Monday, December 7, 1936." As the court has not specified any particular points which it desires clarified in this additional brief we may fail to add anything of value to appellee's original brief.

SUMMARY OF ARGUMENT

In addition to the reasons set out in appellee's original brief, the judgment of the Washington supreme court should be affirmed for the following reasons:

(a) All relative statutes should be construed together.

(b) The statutes involved are apparently valid and fair.

(c) No excessive fees or charges are imposed on utilities.

(d) Regulatory fees are operating expenses reflected in rates.

(e) Regulatory costs and expenses may be taxed against the utility.

(f) The Washington department of public works was authorized to cooperate with the interstate commerce commission.

(g) The department of public works had jurisdiction over reparation cases to recover excess railroad charges.

(h) The evidence shows that costs of regulating railroads far exceeded the fees imposed therefor.

ARGUMENT

Appellant sued the State of Washington to recover back a fee based upon their gross revenue from intrastate transactions for each year involved. This fee was imposed under Laws of 1929, chapter 107, section 1, Rem. Rev. Stat., 10417, which statute is set out at the top of page 8, brief of appellee, but for convenience we will copy it here. It is as follows:

"Section 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue; *Provided*, That the fee so paid shall in no case be less than ten dollars."

Appellant's contention was and is that the statute is unconstitutional because violative of the commerce clause and the 14th Amendment of the United States constitution. The controversy involves the fees paid for the years 1929, 1930, 1931, 1932, and 1933. In each of these years, the percentage imposed by the statute was the same, the only difference being in the amount of the gross intrastate revenue upon which the fee was figured, and the consequent difference in the fee. Such being the case, for convenience the cause of action involving the year 1933 only is discussed. The same disposition must be made of the fee for each of the other years.

All during the years involved all corporations doing intrastate business in the State of Washington, whether public service or not, were required to pay for the privilege of so doing a certain tax or fee under chapter 227, Laws of 1929, Rem. Rev. Stat., sections 3836-1 to 3836-10 inclusive. Under these statutes the fee charged to appellant for the year 1933 was the sum of $985.60 (R. 41). Section 8, chapter 227, being Rem. Rev. Stat., section 3836-8, is as follows:

> "Sec. 8. That the annual fee required to be paid to the department of public works by any public service company shall be deducted from the annual license fee provided herein and the excess only shall be collected."

This section requires the $985.60 to be set off against the fee of 1/10th of 1% amounting to $3,137.04, imposed for regulatory purposes under chapter 107, Laws of 1929, Rem. Rev. Stat., section 10417, *supra.* (Brief of appellee pages 12-13, R. 43 and 122.) It will be seen by the above that appellant's account with the State of Washington for the year 1933 was and should have been computed as follows:

Regulatory fee 1/10th of 1%	$3,137.04
Less privilege tax allotted against it under Laws of 1929, chapter 227, Rem. Rev. Stat., §§ 3836-4-5-6-8	985.60
Balance for cost of regulation	$2,151.44

The above sum of $2,151.44 is approximately 1/15th of 1% of appellant's gross operating revenue from intrastate transportation for the year 1933. (R. 122) It is this balance that appellant claims is excessive. There can be made no better argument against appellant and in behalf of appellee and the validity of the involved statutes

than the opinion of the Washington supreme court in reversing the trial court, which opinion appellant asks this court to reverse. We can only hope to supplement that opinion to some extent. The opinion in full is found in the record (R. 85-93), and reported in 184 Wash. 648.

Appellant's pleadings and brief deal at length with prior statutes of the state imposing regulatory taxes upon public service corporations. (R. 1-34. Brief of appellant, pages 2, 3, 22, 23.) Such former statutes, however, being superseded by the one now in effect, are immaterial. Appellant's position is based solely upon the claimed unconstitutionality of chapter 107, Laws of 1929, Rem. Rev. Stat., section 10417, *supra*. If this statute violates the United States constitution then the decision of the supreme court of the state will be reversed. On the other hand, if this statute is constitutional the decision of that court is correct and should be affirmed.

It will be noted that the statute excepts "auto transportation companies and steamboat companies holding certificates under chapter 248, Laws of 1927." This latter statute is found in Rem. Rev. Stat., section 10361-2. It reads in part as follows:

"Every steamboat company holding a certificate under this act, shall between the first and fifteenth days of March of each year file with the Department of Public Works, a statement showing the gross operating revenue of such company for the preceding calendar year, or portion thereof, and shall pay to the said department a fee not to exceed one-fifth of one per cent of the amount of such gross operating revenue: * * *"

The rest of the statute requires an adjustment of the fees to the whole cost of regulating the steamboats thereunder, but as the statute authorizes steamboats to be

charged up to as high as one-fifth of one per cent the railroads do not appear to be discriminated against because of the terms of the Laws of 1929, chapter 107, Rem. Rev. Stat., section 10417, *supra.*

Regulatory Fees Are Operating Expenses

Appellant claims Laws of 1929, chapter 107, Rem. Rev. Stat., section 10417, to be unconstitutional and void because the fee imposed thereby is excessive. No other reason is given. We think we have sufficiently disposed of this claim in our original brief. Furthermore, as appellant is a public service corporation only gross excessiveness in regulatory fees could be material. Taxes, fees and costs of regulation hearings are legitimate operating expenses of a utility and are always reflected in the rates of the utility which should be high enough to cover them. In addition to the case cited on page 16 of our brief, on this point, we wish to call attention to the case of *State ex rel. Seattle v. Public Service Commission,* 114 Wash. 646, 195 Pac. 1015, which shows that taxes, and therefore fees, and charges of that class are allowed as operating expenses in the fixing of rates. They are therefore refunded to the utility in that manner.

Cost of Regulation May Be Charged to Utility

The leading case on the right of a state to charge the regulatory expenses of a public utility to the utility is *Charlotte C. and A. R. Co. v. Gibbs,* 142 U. S. 386, 35 Law Ed. 1051, which was cited in appellee's brief on pages 14, 19, 28 and 31. Though the decision in that case was rendered as early as 1892 it has been neither overruled nor criticized. Since its rendition it has been repeatedly approved and cited in many cases among which are the

following: It was cited and followed in *Consolidated Coal Co. v. People of the State of Illinois,* 185 U. S. 203 at page 207, 46 Law Ed. 872 at page 876. The statute of Illinois required the inspection at least four times a year of all coal mines employing five or more persons and fixed the fee at not less than $6.00 nor more than $10.00 for each inspection. The fees were used to pay the inspectors' salaries and this court affirmed the Illinois supreme court in holding the statute valid.

The *Gibbs* case was also cited in *New York and Northeastern Railroad Co. v. Town of Bristol,* 151 U. S. 556 at page 571, 38 Law Ed. 269 at page 274. There was involved in that case an order of the state railroad commission requiring a railroad doing both interstate and intrastate business to eliminate a grade crossing. The state supreme court held the act within the regulatory powers of the commission and that the expense was properly chargeable solely to the railroad corporation. In the opinion of this court affirming the state court is found at page 571, the following:

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts

required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. *Nashville, C. and St. L. R. Co. v. Alabama*, 128 U. S. 96 (32:352); *Georgia R. and Bkg. Co. v. Smith*, 128 U. S. 174 (32:377); *Minneapolis and St. L. R. Co. v. Beckwith*, 129 U. S. 26 (32:585); *Dent v. West Virginia*, 129 U. S. 114 (32:623); *Charlotte, C. and A. R. Co. v. Gibbs*, 142 U. S. 386 (35:1051); *Minneapolis and St. L. R. Co. v. Emmons*, 149 U. S. 364 (37:769). Judgment affirmed."

Department's Cooperation with Interstate Commerce Commission Was Authorized

Appellant's brief, pages 23-27, sets out and is devoted to the trial court's finding that the department of public works participated in cases with and before the interstate commerce commission and in reparation cases to recover for the shippers the over-charges of common carriers. In this appellant is unmindful that the state supreme court repudiated the trial court's findings. Be that as it may, the quoted findings show that the case before the interstate commerce commission involved railroads of the state of Washington and the court will take judicial notice of the fact that a railroad from Homestead, Oregon, to Lewiston, Idaho, would naturally lie across part of the state of Washington and be used in intrastate commerce.

When the witness Stookey, auditor of the department of public works, was on the stand and being examined by appellant's counsel relative to proceedings be-

fore the interstate commerce commission, the following occurred:

"* * * Q. You made no attempt to ascertain the cost of litigation the Department is carrying on before the Interstate Commerce Commission of late years?

"A. No.

"Q. It has participated in the cases before the Commission, hasn't it?

"A. Yes, sir.

"Q. Those were expensive proceedings, going on for many years?

"Mr. Hannan: I am———

"A. I know there has been a bunch. Docket 17,000.

Mr. daPonte:

"Q. It has been going on for a number of years?

"A. Yes.

"Q. Mr. Stookey, you didn't finish giving—Yes, you gave us the employes for the various years, didn't you?

"A. Yes.

"Mr. da Ponte: That will be all of the plaintiff's with the understanding that when the 1934 reports are in, we can file that.

By Mr. Hannan:

"Q. Mr. Stookey, Docket 17,000 was a railroad case, wasn't it, involving railroad fees?

"A. Yes, I always assumed it was a railroad case.

"Mr. daPonte: It was.

Mr. Hannan:

"Q. What do you mean by reparation cases? I believe you testified on direct there were some reparation cases.

"Mr. daPonte: I agree with you those reparation cases were brought to recover refund on excessive charges.

"Mr. Hannan: And those involved railroads, also.

"Mr. daPonte: Yes. * * *." (R. 69-70).

Proceedings before the interstate commerce commission involving the railroads of the state were authorized by law and were within the jurisdiction of the department of public works. *Northern Pacific Railway Co. v. The Department of Public Works,* 136 Wash. 389, 240 Pac. 362.

THE DEPARTMENT WAS VESTED WITH JURISDICTION OVER REPARATION CASES TO OBTAIN REFUNDS OF OVERCHARGES MADE BY COMMON CARRIERS

Rem. Rev. Stat., section 10434, though subsequently amended was during the years involved, as follows:

"Sec. 10434. *Refunds and overcharges—Determination by Director of Public Works.* The director of public works shall have power and it shall be his duty, upon complaint in writing being made to him, to determine the amount of overcharge made and refund due in all cases where any public service company, as defined in this chapter, charges an amount for any service rendered in excess of the lawful rate in force at the time such charge was made, or which may thereafter be declared to be the legal rate which should have been applied to the service rendered, and to determine to whom the overcharge should be paid: Provided, that this act shall not apply to controversies arising in relation to contracts in existence prior to the taking effect of this chapter." *Northern Pacific Railroad Co. v. Sauk River Lumber Co.,* 160 Wash. 691, 295 Pac. 926.

THE EVIDENCE SHOWS THAT THE COST OF REGULATING RAILROADS DURING THE PERIOD INVOLVED EXCEEDED STATUTORY FEES IMPOSED THEREFOR

Appellant made no showing of the cost of regulating railroads in the state of Washington (R. 64-65). On the other hand appellee introduced evidence showing that the actual cost of such regulation for the years involved greatly exceeded the fees exacted of the railroads there-

for (R. 72-82). Appellant made no objection to the admission of such evidence until after cross-examination (R. 72-74). The supreme court of the state considered the evidence admissible and preponderating in appellee's favor (R. 91). This court will accept the state court's position as to admissibility. *Cleveland C. C. & St. Louis R. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1041.

CONCLUSION

We wish to conclude by reminding court and counsel that this is a law action to recover fees claimed to be excessive, and that the burden is on appellant to make its case. It has shown neither that the statute is void on its face nor that the fees imposed thereby are excessive. Not having done so no administrative invalidity can be presumed. It necessarily follows that the judgment of the Washington supreme court should be in all things affirmed.

Respectfully submitted,

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